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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re L.M., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant.

E050083

(Super.Ct.No. SWJ009056)

OPINION

APPEAL from the Superior Court of Riverside County. Bradley O. Snell,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part; reversed in
part with directions.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Carole A. Nunes Fong, Deputy County
Counsel, for Plaintiff and Respondent.

K.S., father of L.M. (father), appeals from a juvenile court exit order terminating a dependency after awarding custody of L.M. to her mother, B.M. (mother), and conditioning visits between father and L.M. on L.M.'s consent. L.M.'s custody had been awarded to mother in a family law proceeding based on father's verbal and emotional abuse of L.M. a year before the dependency. The dependency was based on emotional abuse by father, who verbally abused L.M., her mother, her stepfather, as well as the Department of Public Social Services (DPSS) social worker throughout the dependency. As a consequence, L.M. suffered twitches and tics at the mention of father's name, and she did not want to see him. At the disposition hearing, the juvenile court placed L.M. with her mother, and ordered reunification services for father, including visitation in a therapeutic setting and a psychological evaluation, which he refused to undergo.

At the six-month review hearing in October 2009, the court found reasonable services had been provided, and conditioned father's visitation with L.M. upon the visits taking place in a therapeutic setting with the consent of L.M.'s therapist, due to father's ongoing verbal abuse of the parties and refusal to cooperate with services. In January 2010, the court terminated the dependency after making exit orders, which provided for visitation with L.M. only upon the consent of L.M. Father appeals this order. We affirm the reasonable services finding, but reverse the order providing for visitation only with the minor's consent.

BACKGROUND

L.M.'s parents were not married but at some point prior to the events leading to the dependency, L.M. had lived with her father. Father had been awarded custody when

L.M. was seven years old because her stepfather had a CPS (Child Protective Services) case. However, approximately a year before the current dependency petition was filed, mother sought and was awarded custody of L.M. through the family law court because L.M. alleged father had physically abused her. The family law court custody order provided for visitation between father and L.M. on alternating weekends and Tuesdays and Thursdays from 2:30 p.m. to 8:00 p.m. A few weeks prior to the initiation of the current case, L.M., age 15, disclosed father made her uncomfortable by undressing and showering with the bathroom door open, and asking L.M. to lie in bed with him to watch television. Although L.M. denied any inappropriate touching occurred, father's conduct made her uncomfortable.

On February 13, 2009, L.M. did not want to go visit her father but was persuaded to go. However, father did not return L.M. to her mother as required by the custody order, and, when mother called to inquire, father told mother that L.M. did not want to speak to mother or return home. Father later took L.M. to Loma Linda University Behavioral Medical Center claiming that L.M. had threatened to kill herself, where she was placed under a hold. Although L.M. was diagnosed with a major depressive disorder, L.M. stated she only wanted to hurt herself because her father told her that mother had called and said she did not want L.M. to come home again. L.M. was observed to have nervous twitches or tics in her hands due to anxiety.

A dependency petition was filed on February 27, 2009, alleging failure to protect

(Welf. & Inst. Code,¹ § 300, subd. (b)) and serious emotional abuse. (§ 300, subd. (c).)

L.M. was detained out-of-home at the detention hearing. The jurisdiction hearing took place on March 23, 2009. At the jurisdiction hearing, the petition was amended to delete the serious emotional abuse allegation (§ 300, subd. (c)), and the parents submitted to jurisdiction on the basis of the social worker's report. The jurisdictional report included information from a 1998 psychological report that described father as engaging in threatening and intimidating behavior, which resulted in the termination of mediation in the prior family law case. The report noted that the parents had been in a custody fight for several years, causing L.M. to experience depression and anxiety.

The report further noted that father was suspected of having unresolved mental health issues based on his outbursts, aggression and other eccentric and unpredictable behavior which negatively affected L.M. Father was also grandiose in his manner, dropping names and exaggerating. For instance, he claimed that when he worked at a hotel, he worked with presidents, stars and the elite society, and had special secret service clearance. He stated his mother and a neighbor (with whom his father had an affair) went to cooking class with Ron Howard. He also told the social worker that when L.M. was two and one-half years old, she went to Loma Linda University School of Dentistry where she had 13 cavities, two root canals, and two caps.

The trial court found the allegations of the amended petition were true and that the minor came within section 300, subdivision (b). The court removed custody from father

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

but ordered that mother retain custody. Family maintenance services were ordered for mother, and reunification services were ordered for father, including supervised visitation.

On March 30, 2009, shortly after the jurisdiction/disposition hearing, a team decision meeting (TDM) was conducted to discuss L.M.'s recent return to her mother's home and reunification services for father, with mother, father, stepfather, and the social worker present, along with others, including a supervising social worker. At the meeting, father became rude and hostile toward the stepfather and DPSS staff who were present. He pointed threateningly at the DPSS supervisor, accused the stepfather of being a gang member and a convicted felon child molester, and raised his voice several times. His behavior upset L.M. who began to have tremors and cried. Father was asked to leave the meeting and was escorted out by security. After father left, L.M. stated she did not want to visit or have phone calls with her father.

In an addendum report prepared after the TDM, the social worker disclosed the recent behavior by father at the meeting, and indicated father had made countless calls to DPSS in which he made irrational statements and unverifiable claims. The social worker recommended that visits between father and L.M. take place in a therapeutic setting, and requested an order that father submit to a psychological evaluation. On April 21, 2009, the court held an ex parte hearing on the issue of father's visits and granted the social worker's request that visits occur in a therapeutic setting with the therapist's consent, also authorizing a psychological evaluation of father. Although father objected to the requested order at the hearing, he did not appeal.

In September 2009, the matter came on for a six-month reviewing hearing, but was continued at father's request for a contested hearing. The social worker's report for that proceeding noted that L.M. continued to experience ticks when she was nervous or excited, and her hand trembled when discussing her father. L.M. did not want to see or visit father and her therapist recommended against seeing him because he was the cause of her anxiety.

In the meantime, the report observed that father's participation in reunification services was not going well. Participating in two counseling sessions, father terminated the sessions and rescinded the release of information he had previously signed, to prevent his counselor from communicating with the social worker. Father demanded a new therapist, but a new referral could not be made without a release, so it was a few months before he could be assigned a new therapist. Father was referred to a psychologist for an evaluation, but he was unwilling to cooperate; when reminded of the requirement, father told the DPSS caller to tell the department to go straight to hell. Father could not be referred for a medication evaluation due to his unwillingness to be evaluated.

Additionally, father informed DPSS he would not take a parenting class because he taught parenting classes, although he did participate in a coparenting program. His conduct in harassing the mother and stepfather was ongoing. The mother and stepfather had to change L.M.'s telephone number to prevent the calls, and L.M. was adamant she did not want to visit father. For this reason, L.M.'s therapist did not consent to a visit.

Further, father continuously called DPSS and left voice messages that were described as threatening and condescending, often involving name-calling and profanity.

In one phone call, father refused to talk or meet with a social worker unless his list of demands were met. In a more recent call, father cut off the social worker's attempt to respond to his questions and told the social worker not to talk, calling the social worker incompetent, using profanity, and yelling to the point that the social worker terminated the call.

On July 8, 2009, when the social worker attempted to meet and discuss the case with father, father challenged the social worker and threatened to sue various other social workers who were, in his opinion, cavalier bombastic idiots. Whenever the social worker attempted to speak, father interrupted with more insulting rhetoric. On July 28, 2009, his nonverbal physical gestures were threatening and he dominated the meeting. The social worker advised the court that it would be detrimental to return L.M. to father's custody because L.M. had posttraumatic stress disorder and anxiety issues due to father's behavior, and father had consistently and adamantly communicated his unwillingness to participate in the case plan.

Because father was uncooperative and defiant, the social worker recommended that father's reunification services be terminated, mother's maintenance services be continued, and that the court issue a restraining order to protect L.M., her mother and stepfather. On September 21, 2009, the court set the contested hearing but issued an order that father stop harassing DPSS.

The contested six-month review hearing took place on October 20 and 27, 2009. At the conclusion of the hearing, the court found that conditions continued to exist that would justify the initial dependency if supervision were withdrawn; the court maintained

L.M. as a dependent child. The minor was ordered to remain in her mother's custody under a continued family maintenance status. As to father, the court found return of custody would be detrimental, that DPSS had made reasonable efforts to reunify father with L.M. but that father's progress was unsatisfactory. The court ordered that any visits between father and L.M. occur in a therapeutic setting and ordered that father participate in a psychological evaluation, as well as a psychiatric medication evaluation. Father did not appeal this order.

On December 15, 2009, father filed an order to show cause (OSC) re sanctions against DPSS and mother, for mother's failure to facilitate court-ordered therapy for L.M., which delayed the scheduling of visits in a therapeutic setting, and DPSS's failure to provide reasonable services to father. In response, DPSS submitted an addendum report which explained that L.M.'s therapy was interrupted due to the therapist's belief that the dependency had terminated and confusion among all the parties as how to reauthorize the therapy. Some therapy appointments were missed due to mother's financial difficulties. The social worker acknowledged that the delay in getting L.M. reestablished in therapy affected father's visits, but the delay was due to scheduling and the mistaken belief that the dependency would be terminated.

The addendum report also noted that several attempts were made to set up visits with L.M. but that the minor had no desire to visit her father, even in therapy. In any event, father still had not fulfilled the court-ordered requirement that he undergo a psychological evaluation and a medication evaluation, which were requirements necessary for him to visit L.M. In fact, on two separate occasions in December 2009,

father indicated—in what the social worker described as a “tirade”—that he was still unwilling to cooperate with the requirement that he undergo a psychological evaluation.

On January 7, 2010, the court conducted a combined hearing on father’s OSC and an ex parte request to terminate the dependency. The court found that DPSS had complied with the case plan and awarded sole legal and physical custody of L.M. to mother. Regarding visitation, the court ordered “supervised visitation only upon the request and consent of [L.M.],” and directed that the dependency would terminate upon the filing of the Family Law exit orders. The court also found that DPSS was not in contempt and denied the motion for sanctions. Father filed a notice of appeal.

DISCUSSION

On appeal, father argues that (1) the finding that reasonable services had been provided was not supported by substantial evidence, and (2) the court compounded the error in making that finding by making an unenforceable and improper family order that violated father’s due process rights.

Initially, we observe that father’s first argument is twofold: As captioned, father argues that the trial court’s finding of reasonable services is not supported by substantial evidence. However, father’s real argument appears to be an attack on the visitation order made at the hearing at which the court made the exit order, conditioning visitation on L.M.’s consent. Father’s second issue is also an attack of the visitation order.

a. Reasonable Services Finding

As to father’s challenge to the trial court’s finding of reasonable services, father has forfeited any challenge to the court’s finding of reasonable services by failing to

appeal after the six-month review hearing, since no reasonable services finding was made at the hearing on January 7, 2010. The hearing that took place with respect to father's OSC was not a review hearing conducted pursuant to section 366.21. In his OSC, father requested that (1) L.M. be provided with counseling/therapy; (2) father have visits with L.M.; and (3) DPSS and mother show cause as to why L.M. had not participated in counseling and why she should not be removed from her placement. The court did not make a reasonable services finding at the hearing from which this appeal was taken and father did not appeal from the reasonable services finding subsumed in the order made at the review hearing, which was concluded on October 27, 2009.

Orders made at review hearings are appealable. (§ 395.) However, notice of appeal must be filed within 60 days of the order. (Cal. Rules of Court, rule 8.400(d).) A parent may not attack the validity of a prior appealable order for which the statutory time for filing an appeal has passed. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259, citing *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1396.) Father did not appeal that order, and the findings subsumed in that order are now res judicata and final. (*In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705.) The challenge to the adequacy of reunification services has been forfeited. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

b. Delegation of Authority to Determine Whether and When Visitation Will Occur

As to father's real argument, relating to the visitation order contained in the family law exit order, we agree that the order as written appears to delegate judicial authority to

L.M. to determine whether visitation occurs. However, on this record, the juvenile court should have denied visitation outright, given the weight of the evidence that visitation was detrimental to L.M.

When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court, the juvenile court may issue a protective order and an order determining the custody of, or visitation with, the child. (§ 362.4; *In re Chantal S.* (1996) 13 Cal.4th 196, 202-203.) Thus, when the juvenile court terminates its jurisdiction over a dependent child, section 362.4 authorizes it to make custody and visitation orders that will be transferred to an existing family court file and remain in effect until modified or terminated by the superior court. (*Chantal S.*, at p. 203, citing *In re Roger S.* (1992) 4 Cal.App.4th 25, 30.) We review a juvenile court's decision to terminate dependency jurisdiction, and to issue a custody or "exit" order pursuant to section 362.4, for abuse of discretion. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.)

When visitation is ordered, it is the court's responsibility to ensure regular parent-child contact occurs, while at the same time providing for flexibility in response to the changing needs of the child and to dynamic family circumstances. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374.) To achieve this end, the court may delegate to the social worker the responsibility and authority to manage the actual details of the visits, including the power to determine the time, place and manner in which the visits should occur. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757.) However, the power to decide whether *any* visitation occurs belongs to the court alone. (*In re Christopher H.*

(1996) 50 Cal.App.4th 1001, 1008-1009.) For this reason, visitation orders that were conditioned upon a child's consent have been found to be unreasonable delegations of judicial authority. (See *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138; *In re Julie M.* (1999) 69 Cal.App.4th 41, 50-51.)

While the children may not hold free reign over visitation, their "desires may be a dominant factor" in crafting a visitation order. (*In re Nicholas B.*, *supra*, 88 Cal.App.4th at p. 1138.) Thus, a parent's "interest in the care, custody and companionship of their children is not to be maintained at the child's expense; the child's input and refusal and the possible adverse consequences if a visit is forced against the child's will are factors to be considered in administering visitation." (*In re S.H.* (2003) 111 Cal.App.4th 310, 317, citing *In re Julie M.*, *supra*, 69 Cal.App.4th at pp. 50-51.) A child's "aversion to visiting an abusive parent may be a 'dominant' factor in administering visitation," but it cannot be the *sole* factor. (*Julie M.*, *supra*, 69 Cal.App.4th at p. 51.) At the very least, the court may let the children "express their desires in this regard." (*In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237.)

In *Julie M.*, the mother had a long history of drug abuse and assaultive behavior. Like the father in this case, the mother in *Julie M.* was also verbally abusive. The trial court in that case originally ordered visitation under an order that allowed the children's therapist to override the children's wishes, but later modified that order to provide that the children had the option to consent to, or refuse, any future visits with their mother. (*In re Julie M.*, *supra*, 69 Cal.App.4th at p. 46.) The Court of Appeal acknowledged that the evidence showed the children sustained legitimate emotional damage from mother

visits, and that those reactions might serve as a basis for curtailing future visits (*id.* at p. 50) but concluded that the juvenile court had abused its discretion in delegating judicial power to the children. (*Id.* at pp. 48-49, 51.)

We are faced with a parent suffering from a personality “issue” similar to the mother in *Julie M.* but father has so far resisted any attempts to evaluate, diagnose or treat him. We are also faced with a child who has sustained legitimate emotional damage from her visits; additionally, she suffers emotionally and physically (with tremors and tics) at the mere mention of her father. To force L.M. to visit with father under these circumstances would be detrimental to her welfare. In such circumstances, visitation may be suspended or severely restricted if the court determines this would be in the child’s best interest. (See *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581 [denial of visits affirmed where minor feared father because of physical abuse and would be uncomfortable in father’s presence even if accompanied by a third party]; *In re Marriage of Kim* (1989) 208 Cal.App.3d 364, 371 [father’s violent and oppositional behavior necessitated denial of visits pending a psychological evaluation].) A court (juvenile or family law) may deny a parent visitation if visitation would be harmful to the child. (§ 362.1, subd. (a)(1)(B); Fam. Code, § 3100, subd. (a); *In re S.H.*, *supra*, 111 Cal.App.4th at p. 317.)

While it was improper for the court here to give L.M. sole discretion to refuse to visit, father received a windfall by receiving any award of visitation rights at all, considering the weight of evidence that would have justified a suspension of visitation. (See *In re Chantal S.*, *supra*, 13 Cal.4th at p. 214 [“The fact that the juvenile court

rejected that course [i.e., denial of visits] and instead issued the restrictive order challenged now, amounts to a windfall to father, not a violation of his rights.”].) For this reason, we must reverse the order conditioning visitation upon the consent of the minor as an improper delegation of judicial authority and an abuse of discretion in the technical sense.

However, on remand, the juvenile court may consider denying visitation altogether due to the detrimental effect it has had on the minor, or, in the alternative, to condition the commencement of visitation on the father’s completion of a psychological evaluation and any recommended treatment, and the approval of the child’s therapist.

DISPOSITION

We affirm the finding that reasonable services were provided. The visitation order is reversed and remanded for further proceedings to determine whether visitation with father is detrimental to L.M.

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s/Ramirez
P.J.

We concur:

s/King
J.

s/Miller
J.